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No. 74-62

IN THE

Supreme Court of the United States

TERM, 1974

IN RE: FEDERAL GRAND JURY
SUBPOENA OF
MICHAEL GENOVESE

MICHAEL GENOVESE
Petitioner
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS A. LIVINGSTON, ESQ.
205 Ross Street
Pittsburgh, Pennsylvania
Attorney for Petitioner

DENNIS J. CLARK, ESQ.
205 Ross Street
Pittsburgh, Pennsylvania

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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No. .....

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MICHAEL GENOVESE,
Petitioner
UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL GENOVESE, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 5, 1974 and the order denying the Petition for Rehearing dated July 5, 1974.

OPINIONS BELOW

No opinions were rendered by the Court of Appeals. The Court's Judgment Orders, affirming the order of the District Court and denying the Petition for Rehearing, are not yet reported but are set forth in Appendix A.

The Order of the District Court appears in the transcript of the proceeding on May 9, 1974, at which time the Application for Grant of Immunity was presented. This transcript is set forth in Appendix B.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit (Appendix A) was entered on June 5, 1974. A timely Petition for Rehearing (Appendix A) was denied on July 5, 1974. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

The jurisdiction of this Honorable Court is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

1. Whether the mandatory language of the immunity statute directing the Court to grant immunity denies the citizen witness procedural and substantive due process and violates the independence of the Judiciary and the concept of separation of powers?

2. Whether a grant of immunity which does not prohibit the use of a compelled "truthful" answer in a subsequent perjury prosecution is co-extensive with the Fifth Amendment privilege against self incrimination?

3. Whether the Court may immunize a witness before the grand jury without the witness having been accorded the five days to respond to the immunity application as provided by the Federal Rules of Civil Procedure, Rule Six?

4. Whether a witness can be granted immunity if he has not refused to answer questions on the ground that the answers may tend to incriminate him?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FEDERAL STATUTES INVOLVED

Title 18, United States Code, Sections 6002 and 6003 provide as follows:

§ 6002. IMMUNITY GENERALLY

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

§ 6003. COURT AND GRAND JURY PROCEEDINGS

(a) In the case of any individual who has been or may be called to testify or provide other infor-

mation at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub. L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

FEDERAL RULES INVOLVED

Rule Six of the Federal Rules of Civil Procedure provides as follows:

Rule 6. TIME

(a) Computation.—In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President of the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period

originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60 (b), except to the extent and under the conditions stated in them.

(c) RESCINDED. FEB. 28, 1966, EFF. JULY 1, 1966.

As amended Jan. 21, 1963; eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

STATEMENT OF THE CASE

The petitioner, Michael Genovese, was compelled to appear before a Federal Grand Jury in the Western District of Pennsylvania on April 22, 1974. He was interrogated and he invoked various constitutional objections to said interrogation. On each of these occasions after a ruling by the Court compelling the witness to respond to the questions, the witness did in fact respond.

Then, on April 23, 1974, the witness declined to answer three specific questions on Fourth Amendment grounds. The Court ordered the witness to respond to each question and a Fourth Amendment objection would be noted on the record to any subsequent question that might be asked. The Petitioner respectfully declined to respond to the questions and for the first time refused to comply with the Order of the Court, maintaining that such a prospective ruling denied him access to the Court. He was immediately incarcerated for civil contempt.

A few days later after notifying the Court that he would respond to the questions which had been asked, the witness purged himself of the contempt. The Petitioner was directed to return to the Grand Jury on May 9, 1974, at which time he responded to the specific questions that had precipitated his incarceration. Later, during that same grand jury appearance, the witness was asked a question dealing with his activities during the 1960's. The exact question has never been made known to the attorney for the Petitioner since neither a transcript of the questions nor the testimony of the Court reporter was required by the District Court. According to the Government attorney, the form of the question was: "Were you in charge of numbers activity in East Liberty during the 1960's?"; and according to the peti-

tioner's recollection, it was: "Were you in charge of numbers activity in East Liberty in 1960?"

The Petitioner refused to answer this question and assigned as the reason his "Fifth Amendment right". The Petitioner at no time asserted his "privilege against self incrimination" as the basis for his refusal to answer. The Petitioner requested that he be permitted to go before the Court to resolve the question of his legal right to refuse to answer on "Fifth Amendment" grounds. The Court, after being informed of the incident, called for the government attorney to present an immunity application. Counsel for the Petitioner requested five days to respond to the application as provided by Rule 6 (d) of the Federal Rules of Civil Procedure. This request was denied and the application was granted without a hearing.

When the Court signed the immunity order compelling the Petitioner's testimony, the Petitioner advised the Court that he would respectfully refuse to comply until the matter had been reviewed and the order finalized. Petitioner indicated that he would not refuse to comply with a final order. Thereupon, the Court, on its own motion, and without a hearing, ordered the incarceration without bail of the Petitioner. The Petitioner was taken into custody and has been confined in the Allegheny County Jail from May 9, 1974 to the present time while the validity of his detention is being adjudicated.

The Petitioner appealed to the United States Court of Appeals for the Third Circuit who affirmed the District Court on June 5, 1974, and denied the subsequent Petition for Rehearing on July 5, 1974. This petition for Writ of Certiorari followed.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

The Mandatory Language of the Immunity Statute Directing the Court to Grant Immunity Denies the Citizen Witness Procedural and Substantive Due Process and Violates the Independence of the Judiciary and the Concept of Separation of Powers.

The mandatory language of the immunity statute, 18 U.S.C. §§6002-6003, makes clear that the Court is without "statutory" power to refuse a Government attorney's application to immunize a grand jury witness. 18 U.S.C. §6003 (a) reads, in part, as follows:

> "... The United States District Court for the judicial district in which the proceeding is or may be held *shall issue, . . . upon request of the United States Attorney* for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self incrimination . . ." (Emphasis supplied.)

By the above recited provision, the Judiciary *must* give its imprimatur to the solely Executive determination regarding when and to whom immunity is to be granted. The Judiciary's only discretion and/or review in these matters concerns whether the required statutory procedure and form have been followed, i.e., whether the Attorney General has approved the immunity application and whether the Executive has represented in said application that the testimony sought is "necessary to the public interest".

Reasons for Granting the Writ.

Petitioner, Michael Genovese, contends that this process flys in the face of "our basic constitutional doctrine that individual freedom will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States v. United States District Court,* 407 U.S. 297, 92 S.Ct. 2125, 2137 (1972). This process, legislatively devised, allows the Executive (through the Attorney General) to control the Judiciary in a vital area. Not only is the Judiciary stripped of its time honored constitutional role of prior judicial scrutiny, but it is also placed in the position of answering to the unfettered whims of the Executive.

Petitioner submits that there are strong parallels between the instant case and the case of the *United States v. United States District Court, supra.* In both situations, judicial review in a constitutionally protected area of individual rights was non-existent. Quaere: what is the difference between the Executive, on the one hand, mandating the Court to immunize a witness and take away his Fifth Amendment rights, and the Executive, on the other hand, employing domestic wiretaps without Court authorization in violation of Fourth Amendment rights. In the latter situation, *United States v. United States District Court, supra.,* the Executive action was accomplished without the Judiciary's knowledge or approval. Here, the Executive action was accomplished with the Court's knowledge *but* not necessarily with the Court's approval since the Court has no powers of discretion or review. Pursuant to statute, the Judiciary simply must grant the Executive's immunity application.

Also, in *United States v. United States District Court, supra.,* this Honorable Court held that an inde-

pendent party—the Judiciary—had to determine reasonableness and the need for a warrant in order that Fourth Amendment rights are protected. Here, Petitioner believes that an independent party—the Judiciary—should determine whether an immunity grant is "necessary to the public interest" in order that Fifth Amendment rights are protected. Otherwise, our basic constitutional underpinnings will be severly weakened. For, in the words of Alexander Hamilton:

> "... '[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers' ... [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments ..." Alexander Hamilton, The Federalist, No. 78.

Moreover, without prior judicial scrutiny and without judicial power in the immunity area, whatever cannot be accomplished by the Executive because of Fourth Amendment prohibitions can be accomplished by the Executive via the grand jury. To illustrate this problem, imagine a Federal agent arriving at the office of a citizen and seeking to search his desk without a warrant. When the citizen resists, the agent may then cause to be issued a subpoena directing the citizen to appear in a Federal Grand Jury where he may be asked the question, "What did you have in your desk drawer when Agent X asked to search it?" When the witness objects to the question on 4th and 5th amendment grounds, the citizen may be immediately taken before a District Court Judge who immediately grants immunity without notice or hearing. And when the witness refuses to answer the question without disposition of his 4th amendment objection, he

is immediately incarcerated without a hearing and refused bail without a hearing because the appeal is instantly determined to be "frivolous" and because he elects not to rely on the infallibility of the District Court Judge. His only available alternative is to answer the question and run the risk of the contents of the desk being used against him if said contents have relevance in a prosecution for perjury or false statement. Parenthetically, it might be noted that this illustration also demonstrates certain deprivations of due process which occurred in the instant case, to wit, immunization without notice or hearing, instantaneous determination that the appeal was frivolous and immediate incarceration without a hearing.

II.

A Grant of Immunity Which Does Not Prohibit the Use of a Compelled "Truthful" Answer In a Subsequent Perjury Prosecution Is Not Co-Extensive With the Fifth Amendment Privilege Against Self-Incrimination.

It is settled that "a grant of immunity must afford protection commensurate with that afforded by the privilege (against self-incrimination) . . ." *Kastigar v. United States,* 92 S.Ct. 1653, 1661 (1972). Such "is the degree of protection which the Constitution requires . . ." *Kastigar, supra.* at 1664, if one is forced to surrender his right guaranteed by the Fifth Amendment. According to the above cited landmark decision in this area of the law, the requisite degree of protection is afforded by immunity from the use of compelled testimony and evidence derived therefrom. As Mr. Justice Powell explained:

"It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar, supra.* at 1661.

Petitioner, in the matter before this Honorable Court, vigorously agrees with Mr. Justice Powell's reasoning and seeks to apply it to the statute under which he was immunized. In doing so, it becomes apparent that 18 U.S.C. §§6002-6003 does *not* comply with this Honorable Court's view. For, compelled testimony can be used in one respect—a perjury prosecution—and can thereby lead to the infliction of criminal penalties on the person whose testimony was compelled. This danger is particularly acute since it is recognized that a person can be convicted for perjury even if he presented "truthful" testimony.

In arriving at its conclusion that immunity under 18 U.S.C. §§6002-6003 is co-extensive with the privilege against self incrimination, this Honorable Court relied heavily upon its opinion in *Murphy v. Waterfront Commission,* 378 U.S. 52, 84 S.Ct. 1594 (1964). There, the Court reasoned that immunity from use and derivative use "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege" (at 79 and 1610) in the absence of a grant of immunity. See also *Kastigar, supra.,* at 1666. However, a statutory exception is noted, i.e., the witness can be prosecuted for perjury. Accordingly, the witness and the Federal Government are not in the same position as if the witness had invoked his privilege against self-incrimination. If he had invoked his privilege and con-

sequently remained silent, he could not possibly expose himself to a perjury prosecution.

The above discussion points out a substantial deficiency in the protection afforded by an immunity grant pursuant to 18 U.S.C. §§6002-6003. Petitioner considers this so grave as to argue that, because of it, the statute is not co-extensive with the Fifth Amendment. If a constitutional right is to be replaced, a citizen must receive a wholly adequate substitute. The present immunity statute, Petitioner submits, does not satisfy this burden.

Furthermore, it is significant that while the *Kastigar, supra.*, opinion avoids any mention of this aspect of the immunity issue, it clearly prohibits *any* use of compelled testimony.

III.

The Court May Not Immunize a Witness Before the Grand Jury Without the Witness Having Been Accorded the Five Days to Respond to the Immunity Application as Provided by the Federal Rules of Civil Procedure, Rule Six.

On May 9, 1974, after the Court was informed that the witness, Michael Genovese, had refused to answer a question before the grand jury and had invoked his First, Fourth, Fifth, Sixth, Eighth and Tenth Amendment rights, the Government attorney presented an Application to immunize said witness. At that time, the Application was handed to the Court and a copy thereof was served upon counsel for the witness. Counsel for the witness requested five (5) days to respond as provided by Rule Six (6) of the Federal Rules of Civil Procedure.

This request was denied by the Court and the witness was immediately immunized (See Appendix B, pp. 4a-22a).

Prior to the Court's immunity order, the witness was not afforded the opportunity to adequately review the Application. He had no chance to contest the authenticity of Henry Peterson's signature. Nor could he compare the request for approval and the approval. Moreover, he could not challenge the determination that the information sought, to wit, whether the witness operated the numbers business in East Liberty in the 1960's, was "necessary to the public interest" as provided in 18 U.S.C. §6003 (b) (1).

The five day notice requirement in situations of this nature was addressed by the Court in *In Re: Grand Jury Investigation, Stanford Frank, a Witness,* 317 F. Supp. 792, 796 (E.D. Pa. 1970):

> "As immunity from prosecution in lieu of constitutional privilege is so important a matter, procedural fairness indicates that the application and supporting documents should be served in accordance with the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 5(a), (b), 6(d), 81(a) (3) and 7(b). Adequate notice must be afforded to the prospective witness to insure him a full and fair opportunity to point out formal defects in the Government's application."

In this light, petitioner Genovese maintains that he was denied due process because he was not afforded the five days as required and as requested.

IV.

A Witness Cannot Be Granted Immunity If He Has Not Refused to Answer Questions on the Ground That the Answers May Tend to Incriminate Him.

According to 18 U.S.C. §§6002-6003, a witness before a federal grand jury may be immunized whenever he refuses to testify "on the basis of his privilege against self incrimination". In the instant case, petitioner Genovese did not refuse to testify "on the basis of his privilege against self incrimination". Nevertheless, he was immunized by the Court.

A review of the May 9, 1974 transcript will disclose that the witness was asked the following question: "Were you in charge of numbers activity in East Liberty during the 1960's (or "in 1960") ?" On the grounds of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments, the witness refused to answer said question. He did not refuse to answer on the basis of his privilege against self incrimination. Consequently, the Court's immunization order rested upon conjecture as to which provision of the Fifth Amendment was contemplated by the witness.

It is respectfully suggested that Petitioner's failure to respond to the question under the circumstances of this case does not in and of itself amount to contemptuous conduct in the present state of the record. Petitioner has a right before responding to have a ruling by the Court on his First, Fourth, Fifth, Sixth, Ninth and Tenth Amendment objections. And at a hearing on contempt charges, Petitioner should have the opportunity

to rely on the due process provisions of the Fifth Amendment.

Petitioner Genovese contends that the Court's action was improper and denied to him his right of due process of law.

CONCLUSION

In the Court of Appeals, the instant case was dismissed without opinion. The Third Circuit's order did cite *Kastigar, supra.*, apparently evidencing that Court's belief that said decision was dispositive. However, Petitioner firmly believes that *Kastigar, supra.*, did not address the extremely important issues raised here.

Therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS A. LIVINGSTON, ESQ.
Attorney for Petitioner
DENNIS J. CLARK, ESQ.

205 Ross Street
Pittsburgh, Pennsylvania
15219

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1482

In Re: FEDERAL GRAND JURY SUBPOENA
of Michael Genovese

Michael Genovese, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 31, 1974

Before KALODNER, ROSENN AND HUNTER, *Circuit Judges*

Judgment Order

After considering the contentions raised by appellant, to wit:

(1) that the district coure erred in immunizing appellant before the grand jury pursuant to 18 U.S.C. §§6002, 6003 (Supp. 1974) without affording appellant five days to respond to the application pursuant to Fed. R. Civ. P. 6(d);[1]

(2) that the district court erred in immunizing appellant where appellant invoked the fifth amendment but not his privilege against self-incrimination as the basis for his refusal to testify;[2]

---

1. *See* United States v. Taulbee, 476 F.2d 804 (9th Cir. 1973).

2. *See* Quinn v. United States, 349 U.S. 155 (1955).

(3) that the mandatory langauge of the immunity statute directing the court to grant immunity denies the citizen procedural and substantive due process and violates the independence of the judiciary and the concept of separation of powers;[3]

(4) that the scope of the immunity provided by the statute is not co-extensive with the scope of the fifth amendment privilege against self-incrimination;[4]

(5) that the district court erred in immediately sentencing appellant to jail for refusing to testify after receiving a grant of immunity; and

(6) that the district court erred in refusing to grant bail in violation of the eighth amendment;

It is ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed. Costs taxed against appeallant.

BY THE COURT:
MAX ROSENN
Circuit Judge

ATTEST:
THOMAS F. QUINN
Clerk

Dated: June 5, 1974

Certified as a true copy and issued in lieu of a formal mandate on July 15, 1974,

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3. *See* Kastigar v. United States, 406 U.S. 441 (1972).

4. *See* Kastigar v. United States, 406 U.S. 441 (1972).

TEST: M. ELIZABETH FERGUSON
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit
Costs taxed in favor of
appellee as follows:
Briefs $43.00

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1482

In Re: FEDERAL GRAND JURY SUBPOENA
OF MICHAEL GENOVESE
MICHAEL GENOVESE, Appellant

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
MAX ROSENN
Judge

Dated: July 5, 1974

APPENDIX B

Hearing of Thursday, May 9, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: Miscellaneous No. 5983

TRANSCRIPT OF PROCEEDINGS of hearing held Thursday, May 9, 1974, at Pittsburgh, Pennsylvania, BEFORE: The Honorable Barron P. McCune, District Judge.

APPEARANCES:

JAMES E. ROARK, Special Assistant Attorney General, United States Department of Justice, 816 Chatham Center, Pittsburgh, Pa., 15219, appearing on behalf of the Government.

THOMAS A. LIVINGSTON, 205 Ross Street, Pittsburgh, Pennsylvania, 15219, appearing on behalf of Michael J. Genovese.

Marion C. Wike
Official Reporter

(The Court came to order.)

Mr. Roark: Your Honor, this morning, pursuant to Mr. Genovese's appearance before the Court on the 25th of April, Mr. Genovese was subpoenaed and directed to return on the original subpoena, to return before the grand jury that is now on the seventh floor in this building.

At the time of his appearance, to bring the record up to date, an attempt was made by the foreman to again

administer the oath to Mr. Genovese. At that time he refused to take the oath. The grand jury recessed for a short period of time, at which time we approached Judge Snyder, who is the miscellaneous Judge today, after attempting to reach the Court.

Judge Snyder indicated after hearing the facts that he would direct Mr. Genovese, as this Court had done on the 22nd of April, that if he took the Fifth Amendment in response to the question, "Do you swear to tell the truth, the whole truth, and nothing but the truth," he would direct him to answer the question. Mr. Livingston represented if he were directed to answer the question, he would again answer in the negative. Judge Snyder indicated if he answered in the negative, he would direct Mr. Genovese to answer the question in the affirmative, and if he did not, he would be in contempt and be incarcerated.

With that understanding, we went back to the grand jury. Mr. Genovese read a short statement into the grand jury record in response to the question, "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?" The essence of the statement was incorporating your direction that he must answer the question, "Yes," under the threat of incarceration, incorporating that into the grand jury proceedings.

At that time, he also indicated that he would—with that understanding, that he would answer the question, "Yes," and proceed to testify.

At that time I asked seriatim the three questions that had been read by myself to the Court upon the contempt hearing on the 23rd of April.

The first question was taken directly from the transcript of those proceedings. In any case, it was, "Did

Archie Nelson direct, oversee or manage the numbers activity in East Liberty during the 1960's?" After consulting with Mr. Livingston, Mr. Genovese returned and indicated that he did not understand the legal signficance of the words "direct, manage, oversee."

At that time I asked the question, "Was Archie Nelson in charge of numbers activity in East Liberty in the 1960's," and after consulting with Mr. Livingston, Mr. Genovese's answer essentially was, "I have no recollection of Archie Nelson being in charge of numbers in East Liberty during that period of time."

The next question from the transcript of proceedings before the Court was, "Do you know Jack Lerner?" After consulting with Mr. Livingston, Mr. Genovese answered in the affirmative, "Yes."

The third question was, "Did Jake Lerner replace Archie Nelson in charge of numbers activity in East Liberty during the period 1965 to 1969?" After consultation with Mr. Livingston, Mr. Genovese's answer was essentially that he had no recollection of Mr. Lerner doing that during that period of time.

I then asked, "Were you in charge of numbers activity in East Liberty during the 1960's?" After consulting with Mr. Livingston, Mr. Genovese refused to answer the question on the grounds of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments.

The next question was, "Were you in charge of numbers activity in East Liberty from 1970 until the present?" At that time, after consulting with Mr. Livingston, Mr. Genovese stated he refused to answer any more questions until he had an opportunity to appear before the miscellaneous Judge and that he requested that the foreman of the grand jury and/or the grand jurors them-

selves join us before the Court so that they might understand what was going on.

At this time, pursuant to Mr. Genovese's request, and having consulted with this Court, and this Court having agreed to hear the matter, the Government is appearing before the Court at Mr. Genovese's request.

The Court: Is this recital substantially true, Mr. Livingston?

Mr. Livingston: I think the recital is substantially correct. I think I should point out, however, the first instance this morning, before we ever saw a Judge, Mr. Genovese through counsel had indicated a willingness to proceed immediately to testify on the understanding that the record made before Judge McCune, so far as the administering of the oath was concerned, would be binding, and he would proceed to testify under oath as was administered at that time and waive any rights or privileges he might have as a result of not taking the oath again.

He was not willing to abandon his position through counsel that was made at the outset in this particular case; and the statement—for the Court's information—that was read to the grand jury, Mr. Genovese stated, "Mr. Foreman, and members of the grand jury, I regret the inconvenience it may appear I'm causing. I have on a previous occasion before you answered yes to the question whether I swore to tell the truth. There was a legal proceeding before Judge McCune, prior to my giving that answer. I now agree to testify before you as if the oath were administered on the same terms and conditions as though appearing in the record made before Judge McCune.

"So that you may know what transpired, I refuse to answer the question, 'Do you swear to tell the truth,' et cetera, on the ground it may incriminate me. Judge McCune ordered me to answer, though my attorney indicated my answer would be in the negative, and I was ordered to answer in the affirmative under threat of incarceration. I then answered yes without waiving any right with reference to my being compelled to answer yes. I'm ready to proceed now."

Now I was not, as counsel for Mr. Genovese, willing to waive the record so far as that is concerned. When the understanding was reached that the testimony would be received on those same terms and conditions, he proceeded to then answer the questions.

He was then asked about his activity in the 1960's in East Liberty. There has been a record made in this case before Judge Teitelbaum, and it is my understanding of that record, that is not a matter of proper inquiry.

I have in the past in these proceedings raised Fourth Amendment objections, and one of the reasons for the Fifth Amendment objection, at this time there is an appeal in the Third Circuit from the ruling of this Court, which makes prospective decisions of questions that might be asked in the grand jury related to these matters, and I have been given on behalf of the client I represent an objection on the record, but with the compulsion to answer. Those particular questions as of the record are noted.

You will recall, Your Honor, that I indicated the last time we were before you on that particular matter that I had serious doubts as to whether or not that particular portion in this Court ruling infringed upon the

First Amendment right of the defendant to return and petition this Court for a redress of grievances.

In that regard, it becomes significant that the National Commission on Reform of Federal Criminal Laws as well as Congress seemed to recognize the existence when they talked in terms of the proposal relating to the immunity statute, and I quote from the Kastigar opinion in the footnote, as reported in 11 Criminal Law 3049, where the committee said, "We are satisfied that our substitution of immunity," which we don't have here, but I'm getting to the Fourth Amendment question, "immunity from use or immunity from prosecution meets the constitutional requirement for overcoming the claim of privilege. Immunity from use is the only consequence flowing from an individual's constitutional right to be protected from unreasonable search and seizure and the constitutional right not to be coerced into confession."

I think there is a clear area in a grand jury proceeding that an individual has a Fourth Amendment right.

I have in response to what appears to be incriminating questions that have been asked of the defendant, and I maintained earlier and I maintain now at this stage of the proceedings, I think the record will reflect that Judge Teitelbaum agreed with this at this stage of the proceedings that the proceedings have become accusatory in nature, accusing Mr. Genovese of conducting by inference lottery operations in the East Liberty area in the 1960's.

In response to that question, Mr. Genovese raised among other things a Sixth Amendment right as guaranteed by the Constitution to have counsel present during

a custodial interrogation when the interrogation has become accusatory.

I suggest in that regard, as I have indicated to Mr. Genovese, that his liberty has nothing to fear from the judiciary alone, but any citizen would have everything to fear from the judiciary's union with either of the other two defendants. That is out of the Federalist Papers of Hamilton.

I maintain at this particular point, in view of the fact that the last two questions that have been asked on which he has refused to answer until he had an opportunity to appear here, are clearly accusatory so far as this particular individual is concerned, and that at that time when they become accusatory, he has a right to have counsel with him in the grand jury room.

He has requested this morning of the foreman of the grand jury permission to allow his counsel to make a statement to the grand jury. I maintain that the foreman of the grand jury has the power to grant that request if he so desires.

He doesn't urge that as a matter of right. But in the grand jury proceedings, it seems to me there are matters that have taken place in this Court—If it is true that the Justice Department in its grand jury function is only an agent of the grand jury, and the grand jury is not to be the agent of the Justice Department, then the master should know—as the grand jury is the master—should know what is going on so far as these proceedings going on.

This is an attempt here—nothing more—for an attorney, as he is wont to do, to capably represent the client he has been retained to represent in the proceed-

ings. It might appear as patience wears thin there is something more going on. There is nothing more going on.

Until the Court's order, with the single exception to effect an appeal, Mr. Genovese has answered the questions as Judge Teitelbaum, Snyder or Your Honor have ordered.

At this stage, I think there is a possibility of serious transgression in view of the possibility of the last two questions being answered, one of which has not been responded to. There was a request to see the Court before the question was responded to.

The Court: It seems to me the question is far simpler than was presented here on April 26 at 9:30 in the morning.

Mr. Genovese I thought purged himself of contempt by agreeing with this Court he would go to the grand jury and testify, and it appears to me he has reneged on that purging of himself; and I have no course open but to reincarcerate him because his conduct this morning has placed him back in the contempt that I found when I ordered him incarcerated heretofore.

Accordingly, I propose to do that.

Now the record will show that we have covered the argument concerning the Fourth Amendment, we have covered the question whether Mr. Livingston as counsel for Mr. Genovese should be permitted to attend the proceeding in the grand jury room, we have consistently heard from Mr. Genovese through his counsel, as far as I know, the First Amendment to allow citizens to petition the Government. I think we have as one branch of the Government allowed sufficient appearances here,

since there have been repeated appearances on these questions.

Mr. Livingston has made his record. He has made it clearly. He has taken his appeal; and accordingly, I propose herewith to find that the purging has been revoked, that Mr. Genovese is now in the contempt that I found him in prior to April 25th, and I will reincarcerate him.

Mr. Livingston: Might I be heard on that matter, Your Honor?

The Court: Now there is one avenue open for him. He may testify as he agreed to do, and if he proceeds to testify, I will interdict the incarceration, but I don't propose to rule again upon the motions that have heretofore been ruled upon.

Now you can certainly be heard, but you know that my course of action is clear.

Mr. Livingston: I understand. The Court's course of action is clear, Your Honor.

I would urge the Court to consider the fact that Mr. Genovese was directed by the Court under penalty of contempt to answer the specific questions. They have been responded to.

The Court: I ordered Mr. Genovese to go to the grand jury and testify; and if there is any lack of clarity, I'll clear that lack of clarity up right now.

Now you are aware and you advised him no doubt that he can refuse to testify on Fifth Amendment grounds.

Mr. Livingston: And he is being put in jail for it.

The Court: I have not heard him claim the Fifth Amendment at any time in this proceeding.

Mr. Livingston: Mr. Roark stated for the record that he did.

Mr. Roark: The question that Mr. Livingston labels as accusatory, the one question that was answered along with the First, Fourth, Sixth, Eight, Tenth and Fifth Amendment, was included; and if Mr. Genovese is proceeding on the Fifth Amendment, the Government has an application. It would submit to the Court that he be ordered to testify and he be immunized according to 18 U.S.C. 6002-03.

The Court: I stand corrected. Apparently he has claimed the Fifth Amendment, which is a valid claim.

Let's clear the record up so we know what we are talking about. Is Mr. Genovese claiming the Fifth Amendment?

Mr. Livingston: He has claimed the Fifth Amendment, Your Honor.

The Court: Is he claiming it now?

Mr. Livingston: He is only claiming it in response to a question. He is claiming the Fifth Amendment as I have stipulated with Mr. Roark, as he read the record of the grand jury. I can't say he will go back and claim it on the next question.

The Court: If he has claimed it, very well. Present your application.

Mr. Roark: Your Honor, at this time the Government would present an application.

Mr. Livingston: Let me see it.

Mr. Roark: Yes, he has received a copy.

Mr. Livingston: Let the record show I have just received a copy at ten minutes after twelve this date, immediately prior to the matter being handed to the Court; and I would, as the Rules of Procedure which I have discussed before, request five days to respond.

The Court: That request is denied. Let the record so note.

Mr. Livingston: Now I note, if I might be heard on the application, Your Honor, that the application does not include a copy of the U. S. Attorney's request of Mr. Peterson, and I think that it becomes incumbent to the Court to examine the representation made to determine whether or not Mr. Peterson abused his discretion in granting the application.

The Court: Allow me a moment to read the application.

Do you wish to execute the affidavit?

Mr. Roark: Yes, Your Honor, I do. I will.

The Court: Now do you wish to be heard? On what subject, Mr. Livingston?

Mr. Livingston: I wish the five days provided by the Federal Rules of Civil Procedure.

The Court: We have covered that point. On the matter you raised concerning Mr. Peterson—

Mr. Livingston: That the letter of request of Mr. Peterson is not included in the application.

The Court: That is the letter to Mr. Peterson.

Mr. Livingston: Yes.

The Court: We will not require that to be included, and the affidavit has not been executed.

Will you go and execute it and return here forthwith?

Mr. Thornburgh: I believe the deputy clerk is the individual.

The Court: Yes, you can do it before the deputy clerk. Will you swear, Mr. Roark, to the affidavit?

(Mr. Roark was sworn to the affidavit.)

The Court: The dates in Paragraph 4 are blank, and I assume you want May 9th inserted there.

Mr. Roark: That is correct, Your Honor.

The Court: Let the record show I am granting the immunity to Mr. Genovese May 9th, 1974. I will date the order this date. It is now being executed.

Mr. Genovese, you are now advised that you are immunized, that no testimony or other information compelled under the order or any information directly or indirectly derived from your testimony or other information may be used against you in any criminal case, except the prosecution for perjury or for giving a false statement.

Now, Mr. Genovese, you are ordered to return to the grand jury and testify, and you shall proceed forthwith.

Now let the record show that exceptions are automatically noted to all of the Court's rulings, and this proceeding is adjourned.

File the application.

Mr. Livingston: If Your Honor please, may I be heard at this time?

The Court: Yes.

Mr. Livingston: It is the position of the witness, Mr. Genovese, that the application which I have asked to be heard on and asked five days to prepare is factually defective on its face. It is factually inaccurate and does not comport with the statutory requirement as set forth in Title 18, 6002-03.

In that regard, I also urge that the mandatory nature of the attempt by the Legislature to impose upon the Court an Act, without the Court having any discretion, violates constitutional standards and the grant of immunity in that regard, in view of the fact the immunity statute demands the Court grant immunity.

I believe this matter has not been treated yet in the Apellate Court. It has not been treated as mentioned in Kastigar. It has been treated in the Commonwealth of Pennsylvania and in the State Legislature, which have dealt with the mandatory language which appears in Senate Bill 118, and other states have all changed to vest in the Court some discretion.

It would appear in the present state of the record the Court has no power to ensure any citizen that the United States Attorney, the executive, will not compel him to answer questions. The Court here is nothing but the tool of the legislature and the executive under this legislation, in view of the fact the United States Attorney may, with the permission of the Attorney General, submit a petition and the Court shall grant it.

I maintain that the language of the statute itself mandating the conduct of the Court flies into the fact of our whole constitutional system, the separation of powers; and that in that regard, in addition to the fact that

I know of no statutory compulsion or statutory authority, automatically mandating or demanding the Court grant immunity to an individual that takes the Fifth *Amendment, and I urge in* support that the application is factually and legally defective, and I object to the Court order in reliance on that application in its present form, and I seriously protest—and want the record to show—the constitutionality of the Act involved.

The Court: Very well. Let the record so indicate.

We will adjourn.

Mr. Livingston: Now there is one other point in view of the ruling of the Court and in view of the present state of the record.

I have consulted with Mr. Genovese before arriving here. I have advised him so far as my legal opinion, so far as the constitutionality of this particular statute, there is a constitutional question which has been of grave concern to the State Legislatures around the country which are treating this matter now.

I would at this time propose to take an immediate appeal from the Court order, and hopefully the Court would not consider this appeal as being frivolous.

The Court: The ruling of the Court is that you may, of course, take any appeal that the law permits you to take, but there will be no supersedeas of this order; and therefore, the order of the Court remains that Mr. Genovese shall go before the grand jury and testify.

By refusing you a supersedeas, you understand that the order of the Court is presently effective.

Mr. Livingston: Yes, Your Honor. For the Court's information, Mr. Genovese, with the ultimate respect

for the Court, having been advised by counsel of what remedies are available to him at this time, must respectfully decline to return under the compulsions of this immunity grant to testify as a witness.

Mr. Roark: In that case, Your Honor, the Government moves that Mr. Genovese be cited for contempt and incarcerated, and the Government would urge that the question as to whether or not the Court must exhaustively review the application has been most recently determined by this Circuit in the Testa case.

Such appeal based on Mr. Livingston's legal objections would indeed be frivolous; and that Mr. Genovese be incarcerated immediately, and that any bail pending appeal be denied until such time as he comes before the Court and purges himself of his present contempt.

The Court: Mr. Genovese, if this is your decision as stated by Mr. Livingston, I will find you in contempt and order you incarcerated.

I have explained that order to you heretofore.

The incarceration is for the period of time that the grand jury is in session or until you purge yourself again of contempt.

We will deny bail and we will determine that the appeal is frivolous, and I will make the same order that I made, I believe, the week of April 22nd. I do not recall the date of my previous order, but it will be a similar order.

Accordingly, Mr. Duffy, arrange to have a Marshal come here.

The Clerk: There is one in the court room.

The Court: We will proceed accordingly.

Mr. Livingston: April 24th, Your Honor, was the previous order.

The Court: You will take custody of Mr. Genovese.

Mr. Livingston: Wait a minute. Just a minute. Your Honor, I want to make it a part of this record prior to the incarceration of this defendant, a letter I received from Frank J. Gregg, M.D., Two Allegheny Center, Pittsburgh, Pennsylvania 15212, Phone No. 322-2822. I have discussed this matter with Mr. Roark.

"Mr. Thomas A. Livingston, 205 Ross Street, Pittsburgh, Pa."

"Dear Mr. Livingston: Mr. Michael J. Genovese was referred to me in 1968 when he suffered an acute myocardial infarction, acute heart attack. He was treated in the intensive care area of the Shadyside Hospital and after a stormy illness, he went on to a substantially good recovery after he had lost 30 pounds.

"I have seen Mr. Genovese intermittently since that time on the referral of his family physician. Dr. Philip Coletta.

"For most of the years following his acute attack and especially following the weight loss, Mr. Genovese remained free of symptoms and his electrocardiogram began to show effacement of the original heart injury.

"About six months ago, Mr. Genovese called me to say that during the cold weather he began to experience tightness across the chest with effort. I advised him to avoid these circumstances and prescribed Isordil and nitroglycerin.

"During the last six weeks and relating to the stresses that he endured because of a recent and I un-

derstand grave illness of his wife, this man has been under great stress and has experienced more frequent and severe bouts of chest pain. Even though the electrocardiogram did not witness any further damage, I insisted that this man undergo a coronary arteriogram.

"The arteriogram was strikingly abnormal and in brief showed: 1) A total obstruction at the mid portion of the right coronary artery—this change appears old and could be reconciled with the original heart attack. There were no new vessels, collaterals leading to the obstructed artery.

"2) The anterior system was diffusely involved but there was a critical area of obstruction in the anterior descending branch amounting to about 95%. This represents the remaining part of this man's system.

"From the above findings, which are precisely documented and from which I will soon receive black and white reproductions to show the critical areas, I or any Cardiologist would quickly judge this man to be in great peril. Indeed while I have not as yet proposed this and while a surgical opinion has not been had, it is my very strong contention that a surgical bypass will be needed pretty soon.

"The sum of this is that we have a patient with extremely advanced coronary disease, who had substantial injury to his heart in 1968 and who is in the process of developing extremely dangerous obstruction on the opposite side of the heart. In brief, the circulation of the heart itself is hanging by a hair, and this leads me to the drastic conclusion that a major if not fatal heart attack could easily follow any form of harassment or emotional stress.

"The cine pictures and a selected few still black and white films will soon be ready for inspection at the Allegheny General Hospital. Sincerely yours."

I would ask the Court, in view of the medical report and in view of the fact under the statute this appeal must be heard within 30 days, it would not be a great concession if the Court, not changing the order except for physicial reasons to allow for this 30-day period Mr. Genovese to remain at liberty.

Mr. Roark: Your Honor, I don't think this is proper. I think if Mr. Livingston wants to reference the fact that this was discussed with me, it should also be reiterated on the record, Mr. Livingston has had notice of this application and intention to immunize for approximately the last month and a half.

I also think what we have here, as the doctor states, is not a surgical opinion, but it is a contention.

Before Mr. Genovese should be released from the present order of the Court incarcerating him, some sort of evidentiary hearing should be had. There should be an attempt or opportunity for the Government to have Mr. Genovese examined; and before any of these things are done, we should have a surgical opinion and not a medical contention, and the Government would oppose Mr. Genovese being released pending appeal, and requests that the Court maintain the order as it is and Mr. Genovese be incarcerated immediately until such time he purges himself.

Mr. Livingston: Your Honor, I would consent to the examination and report of a Court-appointed cardiologist at the expense of Mr. Genovese.

The Court: It seems to me the way to handle this is to handle it as an evidentiary matter and determine whether Mr. Genovese should be transferred to the hospital at Springfield, Missouri. The federal government has very good medical facilities, and if he is not capable of staying at the Allegheny County Jail, I could have him transferred forthwith.

Accordingly, the order of the Court is not changed at this time.

We will give counsel an opportunity to bring a physician in here, and we will give counsel for the Government an opportunity to have a physician and examine Mr. Genovese, if it has to be done, and then we will determine what institution he should be placed in.

It is true that there are various institutions which might be more suitable than the county jail, but we will not induct the order at this time.

Mr. Livingston: Very well.

(The hearing was concluded.)

I HEREBY CERTIFY the foregoing is a true and correct transcription of the proceedings had in the captioned matter.

MARION C. WIKE
Official Reporter

APPENDIX C

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY INVESTIGATION	Misc. No. 5983

Application

The United States of America hereby makes application to this Honorable Court for an Order instructing Michael Genovese a/k/a "Mike" to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002-6003 and respectfully alleges as follows:

1. Michael Genovese a/k/a "Mike" was subpoenaed to appear on the 9th day of May, 1974 and did appear on May 9th 1974 before a duly constituted Grand Jury of the Western District of Pennsylvania, sitting in Pittsburgh, Pennsylvania. This Grand Jury was then and there inquiring into possible violations of Federal criminal laws.

2. When questioned before this Grand Jury concerning possible violations of Federal criminal laws in the Western District of Pennsylvania, Michael Genovese a/k/a "Mike" refused to answer questions propounded on the grounds that his answers might tend to incriminate him.

3. In the judgment of the United States Attorney for the Western District of Pennsylvania and the Special Attorneys for the United States Department of Justice for the Western District of Pennsylvania, the testimony

of Michael Genovese a/k/a "Mike" concerning the matters under inquiry is necessary to the public interest of the United States.

4. This application is made with the approval of Henry E. Petersen, Assistant Attorney General, Criminal Division, pursuant to the authority vested in him by Title 18, United States Code, Sections 6002-6003 and 28 C.F.R. 0.175. A copy of a letter from the said Assistant Attorney General expressing such approval is attached hereto as Exhibit "A."

WHEREFORE, Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, and Milton J. Carp and James E. Roark, Special Attorneys, United States Department of Justice for the Western District of Pennsylvania, request this Court to order Michael Genovese a/k/a "Mike" to answer the questions propounded to him and to testify and produce evidence relating to the matters under inquiry, pursuant to the provisions of Title 18, United States Code, Sections 6002-6003.

RICHARD L. THORNBURGH
United States Attorney

MILTON J. CARP
Special Attorney
United States Department
of Justice

JAMES E. ROARK
Special Attorney
United States Department
of Justice

Appendix C.

EXHIBIT "A"

DEPARTMENT OF JUSTICE
WASHINGTON 20530

March 13, 1974

Mr. Richard L. Thornburgh
United States Attorney
Pittsburgh, Pennsylvania

Attention: Mr. Milton J. Carp
Attorney-in-Charge
Pittsburgh Strike Force

Re: *Grand Jury Investigation*

Dear Mr. Thornburgh:

Your request for authority to apply to the United States District Court for the Western District of Pennsylvania for an order or orders requiring Michael Genovese, also known as "Mike", to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6002-6003 and 28 C.F.R. 0.175.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General

Appendix C.

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY INVESTIGATION	}	Misc. No. 5983

AFFIDAVIT

JAMES E. ROARK, being duly sworn, deposes and says:

1. I am a Special Attorney with the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice for the Western District of Pennsylvania.

2. This affidavit is submitted in support of my application for an Order directing Michael Genovese a/k/a "Mike" to answer certain questions.

3. My conclusion that Michael Genovese's a/k/a "Mike" testimony is necessary to the public interest was arrived at only after careful consideration of all the pertinent facts.

4. I was present before the Grand Jury on May 9th 1974, throughout the whole of Michael Genovese's a/k/a "Mike" testimony before the Grand Jury on that day.

5. This application is based on the belief that the information sought is necessary and material to the investigation now being conducted by the Grand Jury with respect to the investigation involving possible violations of Federal criminal law. It is respectfully submitted that

the pursuit of investigations such as this formed the basis for Congressional passage of said Immunity Statute.

For these reasons, it is clear that this application is made in good faith and I assert it is made in good faith.

JAMES E. ROARK
Special Attorney
United States Department
of Justice

Sworn and subscribed to before me this ..... day of May, 1974.

Order.

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY INVESTIGATION	}	Misc. No. 5983

Order

AND NOW, this 9th day of May, 1974, upon consideration of the foregoing application of the United States Attorney and Special Attorneys of the United States Department of Justice to require the testimony of Michael Genovese a/k/a "Mike" before a duly constituted Grand Jury inquiring within and for the Western District of Pennsylvania, said witness having refused to testify on the basis of his privilege against self-incrimination.

It is ORDERED in accordance with the provisions of Sections 6002-6003 of Title 18, United States Code, that the said witness, Michael Genovese a/k/a "Mike," shall give testimony before said Grand Jury and shall not refuse to comply with this Order on the basis of his privilege against self-incrimination, but that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information), may be used against said witness, Michael Genovese a/k/a "Mike," in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

J. McCUNE
United States District Judge

Date: May 9, 1974

Certificate of Service

Petitioner, MICHAEL GENOVESE, by his attorney, THOMAS A. LIVINGSTON, ESQ., hereby certifies that the within Petition for Writ of Certiorari has been personally filed with the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has also been personally served upon the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.

THOMAS A. LIVINGSTON
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-62

MICHAEL GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the federal immunity statute (18 U.S.C. 6002-6003) violates the doctrine of separation of powers; that it is not coextensive with the Fifth Amendment privilege against self-incrimination; that a grand jury witness cannot be immunized without five days prior notice; and that he did not in fact invoke the privilege against self-incrimination in refusing to answer questions before the grand jury.

On April 16, 1974 petitioner was subpoenaed to appear on April 22, 1974 before a federal grand jury sitting in the Western District of Pennsylvania. A letter accompanying the subpoena, also dated April 16, 1974, apprised him that the government was prepared to seek an order immunizing him in the event that he invoked his Fifth Amendment privilege against self-incrimination. Petitioner filed a motion to quash the subpoena requiring his presence

before the grand jury which was denied. On April 22, 1974, petitioner appeared before the grand jury, but refused to take the oath which the foreman attempted to administer. The district court ordered petitioner to answer the oath in the affirmative which he then did. In response to certain questions put to him before the grand jury, petitioner refused to answer, claiming First, Fourth, Ninth and Tenth Amendment rights. Petitioner also asserted a right to privacy as grounds for his refusal to answer these questions.

On April 23, 1974, petitioner was adjudged in civil contempt and incarcerated until such time as he would purge himself by answering the questions propounded to him (Tr. April 23, 1974, at 8, 13-14). On April 25 petitioner's counsel informed the court that his client desired to purge himself and he was released from incarceration on the following day. The government subpoenaed petitioner to return to the grand jury on May 9.

On that day petitioner appeared before the grand jury and again refused to take the oath. The court instructed him to take the oath and, after consulting with counsel, petitioner answered three questions before the grand jury. In response to the fourth question put to him, petitioner recited the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Amendments as grounds for his refusal to answer. Petitioner then requested to go before the court before answering further inquiries. In open court the government presented an application (Pet. App. C, 23a) for an order granting petitioner immunity pursuant to 18 U.S.C. 6003 since he had asserted his Fifth Amendment right before the grand jury. The court granted petitioner immunity (Pet. App. C, 28a) and petitioner, through counsel, informed the court that he would not obey the court's order to testify.

The district court found, after a hearing, that petitioner had refused, without just cause, to obey the court's order to testify before the grand jury (Pet. App. B, 15a). The court held petitioner in civil contempt and ordered him incarcerated until he agreed to testify or until the expiration of the term of the grand jury. The court of appeals affirmed *per curiam* (Pet. App. A, 1a).

1. Petitioner contends that the immunity statute, 18 U.S.C. 6002-6003, is unconstitutional because it violates the doctrine of separation of powers, in that the district court has no discretion in dealing with applications for immunity. Specifically, petitioner asserts that a grant of immunity takes away a witness' privilege against self-incrimination and thus the decision to grant immunity should be subject to judicial scrutiny (Pet. 12-13). This contention is without merit.

A grant of immunity removes the privilege against self-incrimination as a basis for a refusal to testify by precluding the use of the compelled testimony in other proceedings, thereby preserving for the witness the benefits of the privilege. So long as the immunity granted is coextensive with the privilege, there is no constitutional violation. The constitutionality of 18 U.S.C. 6002-6003, under which petitioner was granted immunity, was sustained by this Court in *Kastigar* v. *United States,* 406 U.S. 441.

Petitioner nevertheless contends that the immunity statute is not coextensive with the Fifth Amendment's guarantee against self-incrimination since there can be a prosecution for prior perjured testimony based on a compelled truthful answer to the grand jury. This argument ignores this Court's holding in *Kastigar, supra,* 406 U.S. at 460, 462:

> The [Immunity] statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information * * * .
>
> * * * * *
>
> [T]he immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

While immunity would not protect petitioner from prosecution for perjured testimony before the grand jury, he could not be prosecuted for prior testimony on the basis of truthful answers given to the grand jury. See, *e.g., United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9).

2. Petitioner contends, relying on *In re Grand Jury Investigation*, 317 F. Supp. 792 (E.D. Pa.), that the Federal Rules of Civil Procedure require that a witness be afforded 5 days in which to respond to an application for a grant of immunity (Pet. 16-17). Petitioner contends that the court's denial of his request for 5 days in which to respond deprived him of an opportunity, *inter alia*, to challenge the prosecution's determination that his testimony was "necessary to the public interest" as required by 18 U.S.C. 6003(b)(1).

We submit that the district court decision relied upon by petitioner is incorrect. The district court's role in considering immunity applications is purely ministerial, and specifically, the court cannot review the prosecution's determination that the testimony sought is in the "public interest." See, *e.g., In re Kilgo*, 484 F.2d 1215 (C.A. 4); *In re Grand Jury Investigation*, 486 F. 2d 1013

(C.A. 3). Given the limited role of the district court with respect to immunity applications, and the potential for disruption of grand jury proceedings which would result from a 5 days' notice requirement, we submit that Rule 6, Fed. R. Civ. P., which requires such notice for "[a] written motion," does not apply to immunity applications. This conclusion is supported by the language of Section 6003, which characterizes the application for a grant of immunity as a "request," rather than a motion.

Even assuming that Rule 6 is applicable to immunity applications, the rule provides that the court may shorten the notice requirement and it is the general practice to hold an immunity hearing immediately after a witness refuses to testify. See, *e.g., United States* v. *Fitch*, 472 F.2d 548 (C.A. 9); *In re Russo*, 448 F.2d 369 (C.A. 9).

Finally, we note that petitioner was informed six days prior to his first appearance before the grand jury that the government intended to seek a grant of immunity if he refused to testify. Although petitioner complains he did not have an opportunity adequately to review the application prior to the grant of immunity, he has subsequently had ample opportunity to do so and has not contended that the application was in any way defective.

4. Petitioner's final contention is that he did not utilize the required precise language to invoke his Fifth Amendment privilege against self-incrimination. Petitioner asserts that his invocation of the Fifth Amendment as a basis for his refusal to answer the question "Were you in charge of numbers activity in East Liberty during the 1960's?," was not a refusal "[to testify based] on his privilege against self-incrimination (Pet. 18). As this Court stated in *Quinn* v. *United States*, 349 U.S. 155, 162 "a claim of the privilege does not require any special combin-

ation of words." No ritualistic formula is necessary to invoke the privilege; "even the most feeble attempt to claim a Fifth Amendment privilege must be recognized." *United States* v. *Goodwin*, 470 F.2d 893, 902 (C.A. 5), certiorari denied, 411 U.S. 969.

Moreover, even assuming that petitioner did not invoke the privilege against self-incrimination, the district court properly held him in civil contempt. Since none of the other constitutional provisions invoked by petitioner establish a testimonial privilege, he was obligated to appear and testify before the grand jury. *United States* v. *Calandra*, 414 U.S. 338, 345; *Branzburg* v. *Hayes*, 408 U.S. 665. His recalcitrance was thus punishable as contempt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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